IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. W. A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA and OKLAHOMA SECRETARY OF THE ENVIRONMENT J. D. STRONG, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	**05-CV-0329 GKF-PJC**
TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC., CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC., and WILLOW BROOK FOODS, INC.,	)	
Defendants.	)	

DEFENDANT PETERSON FARMS, INC.'S
MOTION IN LIMINE SEEKING TO EXCLUDE EVIDENCE
PURSUANT TO, *INTER ALIA*, FEDERAL RULE OF EVIDENCE 403

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER AUTHORITIES

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PURSUANT TO, *INTER ALIA*, FEDERAL RULE OF EVIDENCE 403

Defendant Peterson Farms, Inc. ("Peterson") hereby submits its Motion in Limine Seeking to Exclude Evidence Pursuant to, inter alia, Federal Rule of Evidence 403, requesting the Court to exclude the evidence, testimony, references, attorney statements, arguments as further discussed herein. In summary, Peterson seeks to exclude and/or limit the following types and categories of materials under Rule 403, among other bases:

1. Peterson seeks to exclude undifferentiated references to (a) Defendants' or Peterson's operations without evidence of ownership or (b) Peterson's continuing operations in the IRW;

2. Peterson seeks to exclude J. Berton Fisher's history of Peterson and its operations;

3. Peterson seeks to exclude collective or undifferentiated references to Defendants' grower contracts, suggesting that all contracts or arrangements are the same;

4. Peterson seeks to exclude references attributing other Defendants' statements or documents to Peterson or any other Defendant not connected with the materials;

5. Peterson seeks to exclude references to (a) Defendants' or Peterson's purported knowledge of any issue without evidence of actual knowledge and (b) references or inferences that industry groups' publications reflect such knowledge;

6. Peterson seeks to exclude indiscriminate references to "concentrated animal feeding operations" or "CAFOs" to refer to poultry feeding operations;

7. Peterson seeks to limit testimony regarding alleged pathogens in any poultry litter associated with Peterson; and

8. Peterson seeks to exclude collective reference to Defendants' "waste."

In support of its Motion, Peterson states and shows as follows:

I. Reference to Defendants' or Peterson's Operations or Peterson's Continuing Operations Should be Excluded From Evidence at Trial

Peterson seeks to exclude general references to Defendants' or Peterson's operations within the IRW, when the operations being referenced are those of the independent farmers and ranchers in the IRW. *See, e.g.*, Dkt. #2062, ¶ 9 (alleging, inter alia, Defendants currently or formerly owned poultry feeding operations in the IRW); *id.*, ¶ 21 (alleging "Defendants' poultry feeding operations are dispersed geographically across the IRW").

In this regard, Peterson does not own and has never owned any poultry operation in the IRW. With limited exceptions, the same is true for the other Defendants. Indeed, the uncontested evidence in this case is that Peterson does not and has never owned or operated any poultry feeding or processing operation within the IRW. *See*, e.g., Ex. 1, Wear Depo. at 18-19;

Ex. 2, Houtchens Depo. at 7, 148.[1] Nonetheless, throughout the proceedings, Plaintiffs have wrongfully attributed ownership of such facilities to Defendants. Any such testimony is not competent, *see* Fed. R. Evid. 601, and would, if allowed, mislead a fact finder and confuse the issues to be considered by a fact finder. *See* Fed. R. Evid. 403.

Moreover, to the extent Plaintiffs make these otherwise illegitimate assertions under some theory of agency, vicarious liability or *Restatement (Second) of Torts* § 427B, such statements are nonetheless inadmissible because they improperly invade the province of the Court and/or the fact finder, insofar as the statements amount to an ultimate legal and/or factual conclusion. *See* Fed. R. Evid. 704; JOHN W. STRONG, MCCORMICK ON EVIDENCE §§ 12, 335 (4th ed. 1992) (noting prohibition on ultimate opinion on a question of law); *Nationwide Transport Finance v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (citing *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1016 (9th Cir. 2004)) (same); *United States v. Stewart*, 433 F.3d 273, 311-12 (2d Cir. 2006) (same); *United States v. Scop*, 846 F.2d 135, 139 (2d Cir.), *rev'd in part on reh'g on other grounds*, 856 F.2d 5 (2d Cir. 1988) (same); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) (same); *A.E.* ex rel *Evans v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991) (citing *United States v. Jensen*, 608 F.2d 1349, 1356 (10th Cir. 1979)); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988).

Peterson also seeks to exclude any reference with regard to Peterson to continuing operations in the IRW when it is undisputed that Peterson has never owned any poultry operation in the IRW and that it terminated its contracts with all poultry farmers in the IRW when it sold certain of its assets, including its feed mill and processing plant (both of which are located outside the IRW), to Defendant Simmons Foods, Inc. in the summer of 2008. *See* Dkt. # 2221,

[1] Of note, Decatur, Arkansas, which is mentioned in one or more of the cited depositions is not located in the IRW.

Asset Purchase Agreement (filed under seal). Since that time, Peterson has not had any contract growers in the IRW or any other watershed. As such, any such testimony or references regarding Peterson's continued operations in the IRW suffer from many of the same infirmities as the improper references to Peterson's non-existent operations in the IRW.

Consequently, for the aforementioned reasons, Plaintiffs should be prohibited from making any statement, suggestion or argument that Peterson or any other Defendant owns or operates any operation or facility in the IRW; suggesting that any operation or facility of any independent poultry grower in the IRW belongs to Peterson or another Defendant; or suggesting that Peterson has continuing operations in the IRW.

II. J. Berton Fisher's "History" of Peterson Should Be Excluded From Evidence at Trial

Peterson seeks to exclude the admission of any testimony of Plaintiffs' expert witness J. Berton Fisher, Ph.D. regarding the corporate history of Peterson, which is contained within Dr. Fisher's expert report submitted in this matter. This purely factual information does not require the endorsement of an expert witness. *See* Fed. R. Evid. 702. Indeed, the probative value of allowing an expert to testify on these factual issues is outweighed by the unfair prejudice to Peterson, insofar as a fact finder may give more weight to an expert endorsement of the facts than they are entitled. *See* Fed. R. Evid. 403. Moreover, these factual issues are by Dr. Fisher's own admission outside of his personal knowledge, s*ee* Fed. R. Evid. 602, and amount to impermissible hearsay. *See* Fed. R. Evid. 801.

As noted, Peterson's corporate history is a factual issue for which the fact finder will not require the aid of expert testimony. The history of Peterson and its operations is not a matter of "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702. Moreover, to the extent that Plaintiffs' are also offering Dr. Fisher as a fact witness regarding the Peterson

corporate history, the subject matter of the testimony is outside Dr. Fisher's personal knowledge, rendering his recitation of the history inadmissible. *See* Fed. R. Evid. 602 (requiring the witness to have personal knowledge of the matter). Indeed, during his deposition, Dr. Fisher testified, and his report confirms, that his purported knowledge of Peterson's history was obtained solely from *Lloyd Peterson and Peterson Industries: An American Story*, which is a book about the history of Peterson's origins and early operations. Ex. 3, Fisher Depo. (9/3/2008) at 102-03; s*ee* Ex. 4, Fisher Report (5/15/2008) at 13 (describing history of Peterson and citing to *Lloyd Peterson and Peterson Industries: An American Story*). Without question, the factual information in the book relied upon by Dr. Fisher is hearsay and is being offered for the truth of the matters asserted therein, rendering it inadmissible. *See* Fed. R. Evid. 801.

As such, Dr. Fisher should be prohibited from testifying on non-expert issues admittedly outside his personal knowledge such as the history of Peterson and its operations.

III. Collective References to Defendants' Grower Contracts Should Be Excluded From Evidence at Trial

Peterson seeks to exclude any collective references, inferences or testimony to the various Defendants' grower contracts. *See, e.g.*, Dkt. #2062, ¶¶ 11, 12, 14 (making reference to "the structure of contracts with the growers" and "Defendants' contracts with the growers"). In the cited paragraphs, Plaintiffs contend that the contracts of all Defendants are essentially identical when it is clear from the face of the language that each Defendants' contracts are different in form and substance. Any such references, inferences or testimony is erroneous, not competent, *see* Fed. R. Evid. 601, and would, if allowed, mislead a fact finder and confuse the issues to be considered by a fact finder. *See* Fed. R. Evid. 403.

For instance, despite Plaintiffs' blanket assertions that Defendants' contracts are virtually identical, all of the Defendants' various contracts are different in both form and substance.

Specifically, Peterson's contracts are unique in one or more ways from this otherwise diverse body of documents. Foremost, because Peterson's former growers valued their litter, *see* Ex. 1, Wear Depo. at 55 and Ex. 5, W.A. Saunders Depo at 8-10, 29, 33, Peterson's grower contracts recognized, acknowledged and affirmed that the individual farmers retained ownership of their litter and derived the agricultural, economic or other benefit from their ownership interest in the litter. *See* Dkt. #2219 (filed under seal) at PFIRWP-085113. Similarly, unlike some of the other Defendants' contracts, Peterson's grower contracts specify that the farmers are responsible for providing bedding material in their poultry houses. *Id*. at PFIRWP-085112.

In addition to these noted differences, as indicated by their Motion for Partial Summary Judgment (Dkt. #2062), Plaintiffs have not established that *all* Defendants prescribe and supply medication for their birds, *see* Dkt. #2062, ¶ 10(c); that *all* Defendants dictate specifications for farmers' poultry houses, *see id*., ¶ 10(f); that *all* Defendants regularly inspect and supervise the independent farmers' operations, *see id*., ¶ 10(g);[2] that *all* Defendants specify clean-outs and cake-outs of the farmers' poultry houses, *see id*., ¶ 10(i); or that *all* Defendants enter into flock-to-flock contracts. *See* Dkt. #2219 (filed under seal) at PFRIWP-085110, 85115; Dkt. #2220 (filed under seal) at PFIRWP-024029.

As such, Plaintiffs should be prohibited from making any collective references or inferences or offering any testimony suggesting that Defendants' contracts with their respective contract growers contain the same language, terms or requirements.

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[2] In support of this particular proposition in their Motion for Partial Summary Judgment, Plaintiffs' sole citation is to the 2007 deposition of Ron Mullikin, notwithstanding that Mr. Mullikin conceded that his knowledge of Peterson's operations and those of its former contract growers was limited and, indeed, nonexistent after he left the company in 2000. Ex. 6, Mullikin Depo. (2007) at 69, 106, 119, 123-24. As such, Mr. Mullikin is not competent to testify on the subject matter for which he was cited. *See* Fed. R. Evid. 601, 602.

IV. Attributing Other Defendants' Statements or Documents to Peterson Should Be Excluded From Evidence at Trial

Peterson seeks to exclude Plaintiffs' use of the statements, testimony or evidence pertaining to other, separate Defendants against Peterson. Plaintiffs have engaged in similar conduct throughout these proceedings, and Peterson expects that, absent the Court's prohibition, this practice will continue at trial. *See, e.g.*, Dkt. #2062, ¶ 16 (offering hearsay statements of Ron Mullikin, former Peterson, employee against all Defendants), ¶ 28 (citing, out of context, inadmissible comments made by counsel for another Defendant against all Defendants),[3] ¶ 51 (citing deposition testimony of Thomas Ginn, who was retained solely by Cargill Defendants to offer expert opinions in support of their defense against all Defendants). Any such statements are inadmissible under Federal Rule of Evidence 403, because it is unfairly prejudicial to any party not associated with the statement, confuses the issues to be considered by a fact finder and would mislead a fact finder into believing the facts are something other than what they actually are. *See* Fed. R. Evid. 403.

As set forth in Defendants' *Motion for Partial Summary Judgment Dismissing Counts 1, 2, 3, 4, 5, 6, and 10 Due to Lack of Defendant-Specific Causation and Dismissing Claims of Joint and Several Liability Under Counts 4, 6 and 10* (Dkt. #2069) (the "Causation Motion"), Plaintiffs have the affirmative burden to prove their claims against each, individual Defendant, *see, e.g., McKellips v. St. Francis Hospital, Inc.*, 741 P.2d 467, 470 (Okla. 1987); *Woolard v. JLG Indus.*, 210 F.3d 1158, 1172 (10th Cir. 2000); *City of St. Louis v. Benjamin Moore & Co.*,

[3] The subject comments, which have been cited repeatedly by Plaintiffs, are offered an example of the types of testimony and references Peterson seeks to exclude and are subject matter of a separate Motion in Limine. *See* Dkt. #2393. Peterson maintains that the comments, as set forth by Plaintiffs, are taken out of context, misleading and otherwise inadmissible against any Defendant for any reason.

226 S.W.3d 110, 114 (Mo. 2007), but have nonetheless "treated Defendants as a single undifferentiated mass in this case." Dkt. #2069 at 7. As noted in the Causation Motion,

> In all tort cases, the plaintiff must prove that *each defendant's conduct was an actual cause*, also known as cause-in-fact, of the plaintiff's injury: Any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with. Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought.

City of St. Louis, 226 S.W.3d at 113-14 (emphasis added); *see* 42 U.S.C. § 6972(a)(1)(B) (requiring individualized proof for injunctive relief under RCRA); *see also Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 776-78 (10th Cir. 2009); *Wood v. Eli Lilly & Co.*, 38 F.3d 510, 512-13 (10th Cir. 1994) (finding Oklahoma has not and would not adopt alternative, collective or non-identification theories of liability); *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (same).

As such, the applicable law and the Federal Rules of Evidence dictate that Plaintiffs cannot offer evidence limited to one particular Defendant against an entirely separate Defendant. By way of example, if—as Plaintiffs' have improperly characterized—a Defendant's contract with its growers "do[es] not transfer ownership of the poultry waste to the growers," Dkt. #2062 at 17, ¶ 14, that purported evidence cannot properly be used against Peterson. Setting aside other objections to the referenced statement and others like them, Plaintiffs cannot establish Peterson's purported liability on any one of their claims using the evidence pertaining to another, separate Defendant. Certainly, this proposition holds true for all Defendants in similar circumstances. Taking Plaintiffs' contention as true solely for purposes of illustration, evidence that one Defendant may own the litter generated on the farm of one of its growers by virtue of the contract between them does not and cannot establish the fact as to Peterson.

Consequently, Plaintiffs should be excluded from attributing evidence pertaining to another Defendant to establish any fact or liability on the part of Peterson. Alternatively, should the Court find that such evidence is properly admissible, although limited in purpose, Peterson requests that evidence be accompanied by a limiting instruction, informing the fact finder how it may consider the evidence. *See* Fed. R. Evid. 105.

V. References to Defendants' or Peterson's Purported Knowledge and Reference to Industry Groups Should be Excluded From Evidence at Trial

Peterson seeks to exclude general references to Defendants' or Peterson's purported knowledge of environmental issues claimed to be related to management of poultry litter, without competent evidence that Peterson or any other Defendant actually possessed such knowledge. Similarly, Peterson seeks to exclude general references to industry trade groups, symposia, conferences and similar organizations and proceedings without evidence that Peterson was a participant in the referenced organization or event.

With regard to both of these related categories, Plaintiffs have attributed the mere existence of a document or publication or industry group, without establishing any foundation, as the knowledge of Peterson or the other Defendants. While the existence of such document, publication or industry group may have limited probative value, without a proper foundation, the limited value is clearly and "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403.

On the first issue, Plaintiffs maintain, and have throughout these proceedings, that they can establish Peterson's and Defendants' purported knowledge and liability on their claims based on the existence of generalized publications by federal and state governments, agencies and agency and university employees, such as those listed in Paragraph 48 of their *Motion for Partial Summary Judgment* (Dkt. #2062). Plaintiffs rely on publications and reports from the U.S.

Department of Agriculture, the U.S. Geological Survey, the Arkansas Department of Environmental Quality, and the Arkansas Natural Resources Commission, among others. *See* Dkt. #2062 at 29-32. They also rely on the opinions of officials from Oklahoma and Arkansas administrative agencies and universities. *See id*. at 32-33. However, Plaintiffs have done nothing to establish, through competent evidence or otherwise, that Peterson knew or should have known of any of the information contained in these types of publications or opinions.

Similarly, on the second issue, Plaintiffs maintain that the publications and opinions held by industry trade groups, such as U.S. Poultry & Egg Association, equate to the knowledge and opinions of Peterson and the other Defendants. However, with few exceptions, Plaintiffs have not established that Peterson was a participant in the trade groups or symposia sponsored by such trade organizations. Moreover, Plaintiffs have not established through competent evidence or otherwise that the positions taken by any trade group was shared by Peterson. Indeed, the Rule 30(b)(6) representative for U.S. Poultry & Egg Association testified that the position of an industry group, such as U.S. Poultry & Egg Association, is *not* necessarily the position of any individual member of the organization by way of default. Ex. 7, Dalton Depo. at 136.

As such, Plaintiffs should be excluded from offering governmental or trade group publications into evidence as the purported knowledge of Peterson or other Defendants without first establishing a foundation of competent evidence that, in fact, Peterson or other Defendants had such knowledge and, where applicable, participated in industry trade groups, symposia, conferences and similar organizations and proceedings.

VI. Reference to Concentrated Animal Feeding Operations Should be Excluded or Appropriately Limited at Trial

Peterson seeks to exclude any reference to any poultry feeding operation in the IRW formerly under contract with it as either a “confined animal feeding operation” or a “CAFO,”

since such references are inadmissible under, *inter alia*, Federal Rules of Evidence 401 and 403. As an initial matter, Plaintiffs dismissed Count 9 of their Second Amended Petition, which alleged Defendants' undifferentiated violations of the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT. tit. 2, § 20-40 *et seq*. (previously numbered OKLA. STAT. tit. 2, § 9-200 *et seq*.). Thus, the terms lack relevance and probative value with respect to any of Plaintiffs' remaining claims. *See* Fed. R. Evid. 401. [4]

Moreover, use of either term out of context to refer to any poultry feeding operation formerly under contract with Peterson is unduly prejudicial to Peterson, and further confuses the issues to be determined by a fact finder and is, similarly, misleading to a fact finder. *See* Fed. R. Evid. 403. In this regard, the definition of "concentrated animal feeding operation" or "CAFO" has a specific, technical meaning under the Oklahoma Concentrated Animal Feeding Operations Act, *see id*. § 20-41(A), (B)(11), and the separate CAFO regulations of the U.S. Environmental Protection Agency. *See* 40 C.F.R. § 122.23(b)(1)-(6). Among the factors distinguishing any of Peterson's former contract growers from a "concentrated animal feeding operation" or "CAFO" are the size of the operation, *see* OKLA. STAT. tit. 2, § 20-41(B)(11)(a)(1)(f), and the administrative determination that the operation "is a significant contributor of pollution to the waters of the state." *Id*. § 20-41(B)(11)(c).

[4] Nothing in this Motion, however, is intended to prevent any party from offering evidence regarding the ability, power and authority of the Oklahoma State Board of Agriculture "to designate a poultry feeding operation as a concentrated animal feeding operation . . . subject to the provisions of the Oklahoma Concentrated Animal Feeding Operations Act after an administrative determination that an operation has violated or is unwilling to comply with any provision of the Oklahoma Registered Poultry Feeding Operations Act" and for such other reasons as set forth in the Registered Poultry Feeding Operations Act. OKLA. STAT. tit. 2, § 10-9.9(A). This type of evidence remains relevant and probative of Defendants' defense and rebuttal of Plaintiffs' claims.

Plaintiffs have not developed any evidence in this matter to suggest that any of Peterson's former contract growers fall within these definitions or otherwise satisfy the aforementioned characteristics of, as defined by law, a concentrated animal feeding operation or a CAFO. Indeed, Peterson has never contracted with the owner or operator of a confined feeding operation in the IRW or otherwise, as effectively evidenced by Plaintiffs' dismissal of Count 9 of their Second Amended Complaint. Accordingly, Plaintiffs should be prohibited from referring to any of Peterson's former contract poultry growers as either a "concentrated animal feeding operation" or "CAFO."

VII. Testimony Regarding Pathogens in Litter Associated with Peterson Should be Limited at Trial

Peterson seeks to exclude any generalized reference to pathogens in waters of the state from poultry litter associated with Peterson or any of poultry grower formerly under contract with it without evidence—which does not exist in this case—that such pathogens were actually traced from the former contract growers' respective operations to the subject waterbody. Plaintiffs' indiscriminate use of the term "pathogens" in reference to any of the poultry operations of any grower formerly under contract with Peterson is inadmissible under Federal Rule of Evidence 403 because it is untrue and, thus, misleading to a fact finder and likely to confuse the issues to be decided by a fact finder. *See* Fed. R. Evid. 403; *see also* discussion, *supra*, Part IV.

In this regard, Plaintiffs have asserted that they are entitled to injunctive relief under RCRA because pathogenic bacteria and microbes purportedly found in land applied poultry litter "may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). In furtherance of this claim, which Plaintiffs have previously failed to establish, *see Attorney General of Okla. v. Tyson Foods, Inc.*, 565 F.3d 769, 778 (10th Cir. 2009),

Plaintiffs sampled the operations of two of Peterson's former contract growers, Two-Saun Farms and O'Leary Farm, and took edge of field samples from a third former grower, Waymon Rhodes. *See* Ex. 8, Sampling Records.[5] Among the things Plaintiffs tested these samples for were staphylococcus, salmonella, total coliform, fecal coliform, E. coli and enterococcus. *See id*. at PI-Fisher00005450. Of note, with the exception of the first two categories, the others are indicator organisms which, as the record in this case has established, are not themselves pathogenic. *See* Ex. 10, Teaf Depo. (1/31/2008) at 129; Ex. 11, Harwood P.I. Test. at 682. Thus, with regard to those things sampled by Plaintiffs at Two-Saun Farms, O'Leary Farm and the operation of Waymon Rhodes, only staphylococcus and salmonella are potentially at issue with regard to Plaintiffs' RCRA claim.

Of the numerous samples of water, soil and litter analyzed by Plaintiffs for these two pathogens, only a couple of the samples from any of the three farms indicated the presence of either pathogen in any detectable limit. Both of these samples were water-related samples taken on or near Two-Saun Farms, *see* Ex. 8 at STOK0018950 (water well used by cattle), and the Waymon Rhodes operation, s*ee* id. at STOK0025409-10 (edge of field sample). Of note, these pathogens were not found in litter samples collected by Plaintiffs, *see id*. at STOK0018980 and STOK0018983, effectively eliminating any inference that the pathogens in the water-related samples originated from litter. *See id*. Moreover, with regard to these few samples where these microbes were present, it is undisputed that Plaintiffs failed to conduct any traditional, or admissible, fate and transport analysis tracing any pathogenic microbe from the location of the positive sample to any waterbody in the IRW. *Cf. Tyson Foods*, 565 F.3d 769 (noting that

[5] One of the documents, *see* PI-Olsen00021350, within Exhibit 8 indicates that Plaintiffs sampled three former contract growers' operations, but no sampling results were located in Plaintiffs' production for the third operation.

"Oklahoma failed to conduct a fate and transport study to establish that any surviving bacteria from poultry litter actually reached the waters of the IRW").

Thus, Plaintiffs have not established any foundation that might otherwise allow them to proffer testimony or offer comments that any pathogenic microbe in the waters of the IRW originated from any poultry operation formerly under contract with Peterson. As such, Plaintiffs should be excluded from making such unfounded statements or eliciting them from others during the upcoming trial of their claims.

VIII. Collective References to Defendants' "Waste" Should be Excluded From Evidence at Trial

Peterson seeks to exclude any reference to Defendants' or Peterson's "waste" when the undisputed facts are that, through course of conduct and contract, the poultry litter generated by any poultry operation formerly under contract with Peterson belonged to the owner or operator of that particular operation. As such, any references to Peterson's "waste" or litter are untrue, unfairly prejudicial, and likely to confuse and mislead a fact finder. *See* Fed. R. Evid. 403. Moreover, such references, if allowed, amount to inadmissible legal conclusions, effectively rewriting the contracts between Peterson and its former growers. *See* Fed. R. Evid. 704; JOHN W. STRONG, MCCORMICK ON EVIDENCE §§ 12, 335 (4th ed. 1992) (noting prohibition on ultimate opinion on a question of law); *A.E.* ex rel *Evans v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991) (citing *United States v. Jensen*, 608 F.2d 1349, 1356 (10th Cir. 1979)); *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988).

The uncontested evidence in this case has established that litter generated by poultry growers under contract with Peterson belonged to the individual farmers. *See* Ex. 1, Wear Depo. at 55; Ex. 6, Mullikin Depo. (2007) at 107; Ex. 9, Henderson Depo. at 20-21. As an initial matter, Peterson's grower contracts specify that the farmers are responsible for providing

bedding material for their poultry houses, which necessarily comprises an appreciable volume of the litter removed from any given poultry house. *See* Dkt. #2219 (filed under seal) at PFIRWP-085112. In addition, because Peterson's former growers valued their litter and considered it part of the valuable consideration supporting their contract, *see* Ex. 1, Wear Depo. at 55 and Ex. 5, W.A. Saunders Depo at 8-10, 29, 33, Peterson's grower contracts recognized, acknowledged and affirmed that the individual farmers retained ownership of their litter and derived the agricultural, economic or other benefit from their ownership interest in the litter. *See* Dkt. #2219 (filed under seal) at PFIRWP-085113.

For Plaintiffs to suggest otherwise is supported neither by the facts in this case nor, indeed, applicable law. Instead, under well-established Oklahoma and Arkansas law, parties are free to contract as they see fit and are bound by the terms of their agreement. *See BP Am., Inc. v. State Auto Prop. & Cas. Ins. Co.*, 148 P.3d 832, 835-36 (Okla. 2005); *Duensing v. State Farm Fire & Cas. Co.*, 131 P.3d 127, 134 (Okla. Ct. App. 2005); *Bendinger v. Marshalltown Trowell Co.*, 994 S.W. 2d 468, 473 (Ark. 1999). A court is not at liberty to rewrite the parties' contract. *Duensing*, 131 P.3d at 134. These principles apply to so-called contracts of adhesion, such as insurance contracts and—in Plaintiffs' estimation—poultry growing contracts. *See id.* (discussing insurance contract).

As such, while Plaintiffs may contend, at trial, that Peterson is liable for the conduct of its former growers' use of their litter under various (untenable) theories, *see* Dkt. #2062 at 51-58, they are and should be prohibited from what amounts to "transferring" ownership of litter, through inadmissible, self-serving and erroneous testimony, references and argument, from the independent farmers, to whom it lawfully belongs, to Peterson.

IX. Conclusion

For the reasons stated herein, Defendant Peterson Farms, Inc. requests the Court for an Order excluding and/or limiting use of the foregoing categories of evidentiary materials, including any and all testimony, references, attorney statements or arguments.

Respectfully submitted,

By /s/ Philip D. Hixon
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CERTIFICATE OF SERVICE

I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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